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No. 03-116

In The
Supreme Court of the United States

DENNIS COCHRAN, individually and in his capacity as the Chief of Police of the City of Edmond,

Petitioner,

v.

TIMOTHY RAY BARNTHOUSE, ANCEL SCOTT FEES, and JAMES DALLAS TEEL, II,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Oklahoma

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE CASE

1. At all material times, Respondents, Timothy Ray Barnthouse, Ancel Scott Fees and James Dallas Teel, III, were commissioned police officers employed by the City of Edmond. All three Respondents competed in a promotional process for the rank of Sergeant, which is comprised of a written examination and an oral "assessment center." This process ended July 29, 1998, which resulted in an "eligibility list" for promotions to Sergeant. This eligibility list was in effect for a period of one year only. The eligibility list placed the officers in order of their overall scores, and listed the Respondents in the top four positions, resulting in all three being promoted to the rank of Sergeant. Another officer who competed for promotion to Sergeant, Dennis Dill, placed at the bottom of the list and was not promoted.

2. On August 7, 1998, Dennis Dill filed a grievance, complaining of the manner in which the assessment center was conducted. On December 17, 1999, over a year after Respondents were promoted to the rank of Sergeant, and after the eligibility list had expired, an arbitration hearing on Dennis Dill's grievance was conducted. On February 23, 2000, the arbitrator ruled the assessment center was conducted improperly, the resulting eligibility list was invalid, and the assessment center portion of the promotional process must be repeated.

3. It is undisputed that the arbitrator's ruling did not mention any of the Respondents by name, did not include a finding or recommendation that Respondents' promotions were invalid, and did not order the Respondents demoted. Nevertheless, after serving as Sergeants for more than a year, Respondents were notified in writing by Petitioner Dennis Cochran, Chief of the City of Edmond Police Department, that effective April 26, 2000, they were

being demoted. Respondents were also notified they must compete in the next assessment center, which they did, but were not promoted back to the rank of Sergeant.

4. Respondents filed a lawsuit and then a motion for partial summary judgment alleging their constitutional rights were violated, because their protected property interests in their employment and ranks were taken without due process, contrary to 42 U.S.C. § 1983. Petitioner filed a motion for partial summary judgment, raising the defense of qualified immunity and addressing other state tort claims. The City of Edmond filed a motion for partial summary judgment contending the invalid selection process invalidated the promotions, making them void *ab initio*, and that no property interest arose as a result of the selection process, that no property interest exists in a procedure, and that Respondents bear the burden of proof that a property interest exists. The City of Edmond also adopted Petitioner's argument as to the qualified immunity defense. The trial court granted summary judgment on all claims to Petitioner and the City of Edmond and denied the Respondents' motion for partial summary judgment, all without comment.

5. Respondents appealed to the Oklahoma Supreme Court and requested the Supreme Court retain the case for disposition. The Oklahoma Supreme Court reversed judgment in favor of Petitioner and the City of Edmond and remanded the case back to the trial court for further proceedings. Oklahoma Supreme Court Vice Chief Justice Watt identified the dispositive questions in the appeal as: (1) Did Appellants have a property interest in their employment and rank as Sergeants?; (2) If so, did Appellees, the City of Edmond and Dennis Cochran, deprive them of that interest and violate their due process rights by demoting them without a hearing?; and (3) Did the trial

court erroneously hold the City of Edmond and Dennis Cochran were entitled to judgment as a matter of law? The Oklahoma Supreme Court answered all three questions in the affirmative.

6. The Oklahoma Supreme Court found the Respondents had property interests in their ranks, the City of Edmond and Petitioner deprived them of those interests and violated their rights to due process. Petitioner argued that the applicable law of due process was not so "clearly established such that reasonable officials would have understood that their conduct violated that right", citing *Dill v. City of Edmond, Oklahoma,* 155 F.3d 1193 (10th Cir. 1998). The Oklahoma Supreme Court disagreed.

7. Petitioner argued that the clearly established law at the time of Respondents' demotion required him to follow the arbitrator's ruling, citing principally to an unpublished opinion by the Oklahoma Court of Civil Appeals, *Fraternal Order of Police Lodge 136 and Adrian Neal v. City of Edmond, Oklahoma,* case number 93,932. Petitioner emphasizes the *Neal* opinion in an attempt to convince this Court that his own experience with the law regarding arbitration reasonably supports his deprivation of Respondents' property interests and rights to due process.

8. Unpublished decisions by the Court of Civil Appeals are not binding law, and are not to be cited as precedent. Oklahoma statutory law, 20 O.S. § 30.5, in part, states:

> The Court of Civil Appeals shall effect disposition of cases assigned to it by a written opinion prepared in such form as the Supreme Court prescribes. *No opinion of the Court of Civil Appeals shall be binding or cited as precedent unless it*

> *shall have been approved by the majority of the justices of the Supreme Court for publication in the official reporter*. (emphasis added).

Furthermore, the Oklahoma Supreme Court correctly determined Petitioner's reliance on this unpublished opinion was misplaced:

> ¶ 22 . . . He contends that the clearly established law required him to accept and follow the Arbitrator's ruling, whether or not he agreed with it, citing the Court of Civil Appeals' June 16, 2000, unpublished opinion in *FOP and Neal v. City of Edmond*, in case number 93,932. However, reliance on *Neal* for guidance in this case was misplaced. *Neal* involved the City's refusal to enforce an arbitration award arising out of a grievance filed by the officer involved, Neal. Here, however, we are concerned with whether Cochran's conduct of demoting Appellants was required to enforce the arbitration award arising from Dill's grievance.

Next, the Oklahoma Supreme Court determined what the law of due process was at the time Petitioner demoted Respondents, and that Petitioner and the City of Edmond were actually aware of the clearly established law:

> ¶ 25 Appellants sustained their burden of naming the *clearly established right*, a property interest in their employment and rank, through the *clearly established federal law at the time*, i.e., the Tenth Circuit Court of Appeals' cases, *Hennigh* and *Dill*. While they are not Oklahoma Supreme Court cases, both cases interpret Oklahoma law and were *published opinions* at the time of the demotions. *Dill* was certainly known

> to the City of Edmond and Chief of Police Cochran. It dealt with a CBA virtually identical to the one at issue herein. (emphasis added).

Finally, Petitioner repeatedly argues *Neal* influenced his decisions (Petitioner's Statement of the Case at ¶ 14), and that experience with the *Neal* case reinforced the commonly held notion in the City of Edmond that appeal of Dill's grievance would prove foolhardy. (Petitioner's Statement of the Case at ¶ 15). Petitioner even cites Mr. Justice Winchester's dissenting opinion, which stated in part:

> Cochran relied upon *FOP and Neal v. City of Edmond*, case number 93,932, an unpublished opinion of June 16, 2000, by the Court of Civil Appeals, in his belief that clearly established law required him to accept and follow the arbitrator's ruling.

It was plainly impossible for Petitioner and the City of Edmond to rely on *Neal* as justification for demoting Respondents. The June 16, 2000 unpublished *Neal* decision was not issued until almost two months *after* Petitioner demoted Respondents on April 26, 2000, thereby depriving them of their property interest and right to due process.

10. Petitioner attempts to justify his deprivation of Respondents' rights to due process by stating he never *believed* the Respondents were "demoted" as that term is used in the "CBA" and the policies of the Edmond Police Department. (Petitioner's Statement of the Case at ¶ 12) (emphasis added). However, it was the Petitioner who used the term, "demoted," in his April 26, 2000 letter addressed to Respondents advising them they were being

"demoted" as a result of the arbitration award. (Appendix A at p. 5a)[1]

11. Petitioner's self-serving assertions of alleged, not established, facts in paragraph 9 of his Statement of the Case should not be in the record before this Court. The facts are not undisputed as established by the Oklahoma Supreme Court nor are they material to this dispute. Their inclusion is simply Petitioner's attempt to persuade the Court he is a good person. In addition, Petitioner states he "permitted" Respondents to continue in their positions as Sergeants. In fact, Petitioner promoted Respondents to the ranks of Sergeant *after* Dill filed his grievance, despite the obvious possibility of an adverse ruling in the ongoing proceedings.

12. Similarly at paragraph 14 of his Statement of the Case, Petitioner again attempts to present self-serving facts not in the record before this Court. Petitioner emphasizes events alleged to have improperly influenced the *Neal* arbitration proceedings. Even if such "facts" were properly considered by this Court, they are so remote that their relevance to this case is less than negligible.

13. Petitioner mischaracterizes the record at paragraph 15 of his Statement of the Case where he states the Respondents failed to "successfully test" and that was the reason for their lawsuit against the City of Edmond and the Petitioner. In fact, one of the Respondents did perform well on the second assessment center, ranking fifth overall. Respondent, *in his discretion, chose not to allow* Tim Barnthouse to continue to serve as a Sergeant, by refusing

[1] "Appendix A" refers to Appendix A to Petitioner's Petition for Writ of Certiorari.

to exercise the discretionary "rule of three" allowed Petitioner pursuant to the CBA. (Appendix A. at p. 4a, n. 2). Therefore, the assertion that the Respondents did not "successfully place, as a result of the second assessment center" is false. (Petitioner's Statement of the Case at ¶ 12). Furthermore, the reason for Respondents' lawsuit is obvious – they were deprived of their property interests and due process rights *when they were demoted*, not when they retested.

REASONS FOR DENYING THE WRIT

Respondents file this brief in opposition to address not only the merits of the Petitioner's arguments but also to correct misstatements and material omissions in the Petition for Certiorari. *See* SUP. CT. R. 15(2).

I. The Only Immediately Appealable Issue Over Which This Court Has Jurisdiction Is the Discrete Question Of Law Determined by the Oklahoma Supreme Court and Challenged by Petitioner. The Oklahoma Supreme Court's Factual Determinations Are Not Immediately Appealable.

In *Johnson v. Jones,* 515 U.S. 304 (1995), this Court discussed at length the types of determinations that are subject to interlocutory appeal when a defendant is denied qualified immunity at the summary judgment stage. In so doing, this Court held that a defendant invoking qualified immunity may *not* appeal the denial of summary judgment insofar as the denial determines whether the pretrial record sets forth an issue of fact for trial. *Johnson,*

515 U.S. at 319-320. The Court, refusing to further extend its determination in *Mitchell v. Forsyth,* 472 U.S. 511 (1985), made clear the qualified immunity issue subject to immediate appeal is only whether or not "certain *given facts* showed a violation of 'clearly established' law." *Johnson*, 515 U.S. at 311 and 313 (citations omitted) (emphasis added).

While Petitioner does acknowledge in writing that "the operative facts are clear" (Pet. at 15), throughout his Statement of the Case, he re-characterizes the decided evidence in order to buttress his argument that the Oklahoma Supreme Court inappropriately denied Petitioner qualified immunity. For example, Petitioner repeatedly glosses over the Oklahoma Supreme Court's express determination that Respondents were demoted. (Appendix A at p. 5a). Instead, he characterizes his demotions of the Respondents as a forced reduction in rank that was followed by the Respondents' own failures to "successfully place" in the second Assessment Center. (Pet. at 4, ¶ 9 and ¶ 11). The record is clear, and the Oklahoma Supreme Court unequivocally determined that Petitioner demoted Respondents effective April 26, 2000. (Appendix A at p. 5a).

The trial court failed to determine a single factual issue and it did not expressly state the legal basis for its determination. Its rulings on both the City's (not at issue here) and Petitioner's motions for summary judgment were concise but included no findings of fact or law whatsoever. (Appendix B at p. 43a). However, the trial court's bare order is not unusual, nor does it create any additional burden for this Court. This is so because the Oklahoma Supreme Court undertook a cumbersome review of the record and determined the facts necessary to its and this Court's decisions. Given this, the facts determined below

are to be taken "as given" by the Oklahoma Supreme Court. *Johnson*, 515 U.S. at 319. Therefore, Petitioner's implicit arguments related to and mischaracterizing the factual findings of the Oklahoma Supreme Court must be ignored. The April 22, 2003 opinion of the Oklahoma Supreme Court sets forth all facts relevant to the single issue now before this Court.

Furthermore, Petitioner repeatedly injects his own subjective beliefs and motivations into the record in order to convince the Court that he was doing what he personally believed was lawful. (Pet. at p. 4, ¶ 12 and p. 6 at ¶ 14). However, this Court has repeatedly held in the context of a qualified immunity defense, an official's *subjective* belief in the lawfulness of his conduct is irrelevant. *Harlow v. Fitzgerald,* 457 U.S. 800, 815-819 (1982). Therefore, this Court should also reject Petitioner's repeated attempts to inject his own subjective motivations and beliefs into the isolated issue before it.

Next, Petitioner does not take issue with the determination by the Oklahoma Supreme Court that the Respondents had property interests in their ranks as Sergeants. Petitioner does in a single and discrete sentence write: "[t]he issue is whether the property interest identified by the Oklahoma Supreme Court in positions gained through an invalidated promotion process remain, or ever became property in the sense of fully vesting in the Respondents." (Pet. at p. 28). This implies Petitioner does not agree Respondents had property interests in their ranks; however, completely absent from the entire brief and any of the questions Petitioner presents for review is any argument that the Respondents did not have property interests or that they were not entitled to due process. Thus, it is apparent that Petitioner has accepted the determination – and on this point the Oklahoma Supreme Court was

unanimous – that the Respondents had protected property interests in their ranks as Sergeants entitling them to due process.

Similarly, at no time does Petitioner argue that Respondent's rights to due process were not violated. He does not seek appeal of the Oklahoma Supreme Court's express determination – and the Oklahoma Supreme Court was also unanimous on this issue – specifically finding Respondents "in the present case received neither 'extensive' nor 'formal' pre-demotion due process; they received ***no*** pre-demotion due process. In fact, their fate was decided by others following a hearing they could not attend. In this case [Respondents] received no benefit from adequate post-demotion proceedings because their grievance was denied. Clearly, [Respondents] herein were not afforded an appropriate level of due process to protect their property interests." (Appendix A at p. 14a) (emphasis in original).

In sum, the only issue currently before this Court is whether to grant certiorari and review the Oklahoma Supreme Court's determination that the Respondents' property interests in their ranks as Sergeants were clearly established at the time Petitioner demoted Respondents without due process. This is the *only* issue upon which certiorari may be properly granted. The factual determinations are not subject to interlocutory appeal and are to be accepted by this Court as given. The other legal rulings of the Oklahoma Supreme Court are not challenged by Petitioner. (*See also* Pet. at p. 25)

II. This Court Should Deny Certiorari Because the Oklahoma Supreme Court Was Correct In Its Determination That the Law Establishing Respondents' Rights To Due Process Was Clearly Established When the City and Petitioner Demoted Respondents On April 26, 2000.

Petitioner continues to insist this Court's rulings on qualified immunity compel the determination that he is entitled to summary judgment. His principal argument is that, according to him, the Oklahoma Supreme Court only first established the property right at issue by its decision in the instant case. Therefore, he urges the law was not "clearly established" prior to the Oklahoma Supreme Court's decision in April of this year. In so arguing, he asked the Oklahoma Supreme Court and now asks this Court to distinguish long-standing precedent of the Tenth Circuit Court of Appeals from the facts of this case on only minute and immaterial details. The Oklahoma Supreme Court rejected this attempt and this Court should as well.

A. In 1998, the Tenth Circuit Determined That Under Oklahoma Law, a Police Lieutenant Held a Protected Interest In His Rank as Lieutenant, Entitling Him to Due Process.

Petitioner argues *Hennigh v. City of Shawnee*, 155 F.3d 1249 (10th Cir. 1998), is distinguishable from this case, and therefore, his complete disregard of *Hennigh's* express holding was objectively reasonable and entitles him to qualified immunity. But *Hennigh* is not materially distinguishable from this case.

Mr. Hennigh was a lieutenant in the municipal police force of Shawnee, Oklahoma. As such, his employment was subject to a collective bargaining agreement negotiated pursuant to the Oklahoma Fire and Police Arbitration Act, 11 O.S. § 51-01 *et seq. Hennigh*, 155 F.3d at 1252. Emphasizing (1) the collective bargaining agreement's restriction of adverse personnel decisions unless "cause shown" is found and (2) the fact that the collective bargaining agreement was contracted pursuant to Oklahoma law, the Tenth Circuit wrote:

> Based on our prior holdings interpreting Oklahoma law and the decisions of the Oklahoma courts that matters concerning the FPAA are not of purely local concern, we hold that Plaintiff had a legitimate property interest in his rank. This property interest was created by state law in the form of the CBA, contracted pursuant to state legislation. The CBA gave Plaintiff a legitimate expectation of continued employment as a lieutenant unless the City found "for cause."

Hennigh, 155 F.3d at 1255. Furthermore, *Hennigh* was not even the first time the Tenth Circuit had considered an issue of adverse action absent a required determination of cause. In *Hennigh* (155 F.3d at 1253), the Tenth Circuit acknowledged its holding as far back as 1991, when in *Campbell v. Mercer*, 926 F.2d 990, 993 (10th Cir. 1991), the appellate court held that when a statute or regulation restricts discharge to circumstances of "just cause," an employee has a protected interest in that employment.

In the case now before this Court, Respondents were Sergeants in the municipal police force of Edmond, Oklahoma. As such, their employment was subject to a collective bargaining agreement negotiated pursuant to the Oklahoma Fire and Police Arbitration Act, 11 O.S. § 51-01

et seq. The relevant terms of the *Hennigh* CBA are virtually identical to the relevant terms of the CBA at issue in this case. The Oklahoma Supreme Court conclusively determined that: "under the terms of the CBA itself, which incorporates Oklahoma's FPAA, an employers' discretion to demote employees is restricted to demotions for cause." (Appendix A at pp. 10a-12a).

Petitioner urges this Court to ignore *Hennigh* as "clearly established" precedent on a single basis, to wit: the demotion in *Hennigh* was the result of discipline and the demotion in this case was, according to Petitioner, not disciplinary in nature. (Pet. at p. 21-22). This argument is without merit for several reasons. First, the CBA in this case prohibited both discipline and demotions, absent "for cause" shown. (Appendix A at p. 11a). *Hennigh* clearly states that when an employment action is by law limited to circumstances that reflect "cause shown," a person has a protected interest. Therefore, under the clear dictate of *Hennigh*, Respondents in this case had a protected interest against both discipline and demotion (whatever the impetus of the demotion may have been). The distinction urged by Petitioner is a matter of semantics, not substance.

Next, Petitioner continues to misrepresent the nature of the act that resulted in the deprivation of Respondents' right to due process. Petitioner writes the deprivation of due process was the "retesting of officers after the first test proved nugatory" and characterizes his conduct as a "non-disciplinary and involuntary implementation of the arbitrator's order." (Pet. at p. 22). Again, it is a matter of undisputed fact that Respondents were demoted. The demotion was the constitutional violation, not the forced participation in a second assessment center. It is also a matter of undisputed fact the arbitration order in question

did not (1) mention Respondents by name; (2) order Respondents must be demoted; or (3) determine Respondents' promotions were invalid. (Appendix A at p. 5a). In short, therefore, Petitioner was not implementing a required dictate of the arbitrator's award when he demoted Respondents. Instead, he was making a discretionary decision that, in his opinion, the arbitrator's award permitted him to demote Respondents, regardless of their well-settled constitutional rights. In this regard, this dispute is no different than the one at issue in *Hennigh*, in which the defendants therein determined that despite the lieutenant's successful defense of disciplinary action under the collective bargaining agreement, the city and police chief were nonetheless permitted to impose a demotion under some other basis, namely the city's charter. *Hennigh*, 155 F.3d at 1254. Returning to this case then, Petitioner is arguing that even though Respondents had a right to due process prior to their demotions, the action he took (along with the City) was nonetheless permitted for some other reason, to wit: the arbitration order. However, the *Hennigh* court rejected attempts to justify the defendants' actions therein based on something other than the CBA at issue in that case, and this Court should do the same.

There is nothing in *Hennigh* that permits the actions taken by Petitioner in this case. In fact, to the contrary, *Hennigh* makes clear that law enforcement officers in Oklahoma who serve pursuant to a CBA negotiated under state law and that prohibits adverse actions absent "cause" are entitled to due process protection in their particular ranks. *Hennigh* also rejects the principal argument advanced by Petitioner, namely that violations of due process are lawful if the act giving rise to the violations is permissible due to some other legal mandate or provision. The Oklahoma Supreme Court's determination that *Hennigh* is an example of clearly established law

serving as fair warning that Respondents' demotions were unlawful is correct and the attempts by Petitioner to minimize the case's significance are unavailing.

B. Also In 1998, the Tenth Circuit Determined That the Collective Bargaining Agreement Between the City Of Edmond and the Edmond Police Officer's Union, Gave Rise to an Edmond Detective's Protected Property Interest in His Continued Employment Because the CBA Prohibited Discipline Without Cause. In So Doing, It Held that the City Of Edmond and the Edmond Police Chief Violated the Detective's Right to Due Process.

In 1998, the Tenth Circuit considered a challenge by (then) Detective Dennis Dill to the police department and the (then) police chief's reassignment of Dill to the patrol division and change of days off. *Dill v. The City of Edmond, Oklahoma,* 155 F.3d 1193, 1202. The detective argued that his transfer and reassignment of days off were retaliatory – disciplinary in nature – and violated both his First Amendment and due process rights. *Id.* Ultimately, allowing a bench verdict in favor of the detective for violations of due process, the Tenth Circuit determined that because the CBA between the City of Edmond and the fraternal order of police provided that management could only "discipline, demote and discharge employees 'for cause,'" the detective "had a protected property interest in not being disciplined without cause." *Id.* at 1206.

The suggestions that *Dill v. The City of Edmond* did not place Petitioner on fair warning that his demotion of Respondents was unlawful and that the case has no common features with this dispute is simply incredible.

The City of Edmond and Petitioner's predecessor – the Chief of Police for the City of Edmond's police department – were actual parties to the case. The *Dill* dispute involved a collective bargaining agreement virtually identical to the one at issue in this case and negotiated between the same parties. The ultimate determination by trial court and affirmed by the Tenth Circuit was that because the City of Edmond CBA prevented discipline without cause, the City of Edmond and Chief of Police could not discipline a police officer without cause and without due process. The trial court's verdict for procedural due process violations against the City of Edmond was affirmed. *Id.* at 1193, 1206, 1208-09 and 1212.[2]

The same provision of the Edmond CBA at issue in *Dill* is also at issue in this case and the provision only allows demotions "for cause." It is simply beyond belief – and Petitioner has never even attempted to argue – that he or a reasonable person in his position would not have actual knowledge of the Tenth Circuit's decision in *Dill*. In fact, the Oklahoma Supreme Court determined as a matter of given fact for purposes of this appeal that both the City and Petitioner had actual knowledge of the Tenth Circuit's holding in *Dill*. (Appendix A at p. 18a).

The Tenth Circuit decided *Hennigh* and *Dill* in 1998 and within two weeks of one another. In 2000, no objectively reasonable person serving as a municipal Chief of Police in Oklahoma, much less the City of Edmond, could conclude that an officer employed under a collective

[2] The police chief in *Dill* was entitled to qualified immunity because the unlawful transfer/discipline in question occurred two years prior to any authoritative case law establishing a property interest in one's retained position. *Id.* at 1212.

bargaining agreement negotiated and entered into pursuant to Oklahoma state law, that limits demotions to "for cause" determinations was not entitled to due process protection of the officer's property interest in his/her rank.

C. Petitioner Urges A Far Too Narrow Interpretation of the "Contours of the Right" Requirement Established in *Anderson v. Creighton.*

Petitioner never expressly argues that he didn't know Respondents were entitled to due process. Instead, repeatedly quoting language in this Court's decision of *Anderson v. Creighton*, 483 U.S. 635 (1987), he argues that the law of due process wasn't sufficiently clear as it related to other established law. In so doing, Respondent emphasizes *Anderson's* directive that in order for qualified immunity to be denied, the right cannot be merely generally established. Rather, the right must have been:

> "clearly established" in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official is protected by qualified immunity unless the very action in question has previously been held unlawful, (citations omitted); but it is to say that in light of preexisting law the unlawfulness must be apparent.

Anderson, 483 U.S. at 641. In essence, what Petitioner urges this Court to conclude is that because prior to this dispute, no court had ever expressly determined that one could have a property interest in rank "where the rank was derived from a promotional list which had been

determined to be void," the law was not "clearly established" at the time Petitioner demoted Respondents. (Pet. at p. 15).

However, such a conclusion is only possible after far too narrow of a consideration of the right at issue here: Respondents' property interest in their ranks as Sergeants. To conclude that the law was not "clearly established" simply because neither the *Dill* nor *Hennigh* plaintiffs achieved their respective positions through a later-declared void selection process is to fall into the trap of evaluating "the very action in question" – a demotion allegedly attributed to an arbitration declaration that an eligibility list was void.

The identical circumstances do not have to have been previously litigated, but only the unlawfulness of the conduct must have been objectively reasonably apparent. *Id.* In this case, pre-existing law established police officers like Respondents have protected interests in their ranks; demotions of officers without cause when the collective bargaining agreement forbids it is a violation of due process; and violations of due process cannot be otherwise justified by the existence of other legal bases for the action in question. In April 2000, these previously established principles placed reasonable officers and Petitioner on notice that demotions of police Sergeants without due process were unlawful.

If this Court was to accept Petitioner's argument that the law was not "clearly established" because courts prior to April 2000 had not considered the demotion of an officer who was promoted pursuant to a "void" eligibility list (a list voided only after it had expired), the result would be that no right would ever be "clearly established." Defendants in all cases would set upon a course of

distinguishing every case precedent on the same types of minute details Petitioner urges in this case – turning qualified immunity into a virtually unassailable shield that would effectively bar all claims of personal liability – something this Court never intended. Officers' subjective beliefs would always be relevant and there would never be a right sufficiently established so as to defeat a claim of qualified immunity. Persons seeking to impose individual liability on officers would be forced to prove that the exact action in question had previously been declared unlawful. Such a legal landscape and course of litigation is precisely what this Court sought to avoid when it decided *Anderson* (as originally acknowledged by the *Mitchell* Court) and reiterated that qualified immunity does not require the "very action in question" be determined unlawful in order to meet the "clearly established" requirement.

III. Binding Arbitration Is Not a Legal Justification for Denying Respondents Due Process.

The Petitioner's focus on the affect of an arbitrator's ruling under Oklahoma law is irrelevant to the determination of whether the Respondents' due process rights were "clearly established" for purposes of Petitioner's liability. The issues to be determined when evaluating the defense of qualified immunity are whether the alleged actions are contravened by currently applicable law and whether that currently applicable law was clearly established at the time the officer acted. *Harlow,* 457 U.S. at 819.

Petitioner does not dispute that the Respondents had a property interest in their ranks and that they were entitled to due process. This was conclusively determined by a unanimous Oklahoma Supreme Court (the three Justices dissented only on the issues of appellate jurisdiction and qualified immunity). Instead, Petitioner argues

that Oklahoma Supreme Court precedent regarding binding arbitration, and in particular the intermediate appellate court's decision and subsequent denial of certiorari by the Oklahoma Supreme Court in *FOP and Neal v. The City of Edmond*, Oklahoma Court of Civil Appeals case number 93,932, imposed a legal burden on Respondent that conflicted with the burdens imposed upon him by *Hennigh* and *Dill*. However, Petitioner's arguments regarding the significance of *Neal* and other Oklahoma decisions related to arbitration are unpersuasive, for a number of reasons.

First, when evaluating a qualified immunity defense, the threshold question is whether the alleged right violated – in this case Respondents' rights to due process – was clearly established at the time the official acted. *Harlow*, 457 U.S. at 819. The inquiry does not require a determination of what other existing laws may be implicated and whether those laws are "clearly established." In this case, Respondents' rights to due process were conclusively established as of April of 2000. *Hennigh* and *Dill* had been law for almost two years.

Instead and next, Petitioner urges this Court to conclude that his disregard of Respondents' constitutionally protected rights is excused by other legal mandates – namely that arbitration awards are generally binding. But *Neal* and the other cases setting forth the binding nature of arbitration are not relevant to Respondents' rights. This case, unlike *Neal* and the other cases cited by Respondent, does not involve the refusal of the City and Petitioner to abide by a binding arbitration decision. Instead, this case involves the decision by the City and Petitioner to demote Respondents without due process, an action they allege was implicitly compelled by the arbitrator's award.

But neither the facts nor the law support any reasonable conclusion that Respondents' demotions were mandated by the arbitration award at issue. The arbitration award did not void Respondents' promotions; it did not order Respondents be demoted; it did not even mention Respondents by name. However, had the arbitration award expressly done so as Petitioner repeatedly urges it did by implication, under existing law that aspect of the arbitrator's award would have been subject to appeal and reversal because it would have exceeded the arbitrator's authority and the scope of the controversy before him.

An arbitrator's function is to enforce the agreement in question and not to protect constitutional rights. *McDonald v. City of West Branch, Mich.*, 466 U.S. 284, 290-91 (1984). If there is a conflict between the requirements of the contract and the constitutional rights of the parties, the arbitrator must enforce the contract. *Id.* Even the individual who loses his or her grievance pursuant to the arbitration is not precluded from bringing suit to enforce his or her constitutionally and statutorily protected rights. *Id.* at 292.

In this case, Respondents were not allowed to participate in the arbitration that Petitioner insists mandated their demotions. (Appendix A at p. 20a, n. 12). Even had they been, under *McDonald*, they still would have the opportunity to challenge the constitutionality of the arbitrator's decision to the extent it allegedly required their demotions. Certainly, if a party to an arbitration is not foreclosed from seeking redress for violations of his constitutional rights, third parties whose rights were violated by an arbitration award are not without a forum for redress.

More significantly, an arbitrator cannot resolve disputes of constitutional rights. Therefore, even if the arbitration award did require Respondents' demotions, that aspect of the award would be appealable and subject to reversal. Even under the authority upon which Petitioner allegedly relied, arbitration orders that exceed the scope of an arbitrator's authority are subject to judicial review. *See, e.g., City of Bethany v. Public Employees Relations Bd. of State of Okl.,* 904 P.2d 604, 614, n. 33 (Okla. 1995) (citations omitted). Since an arbitrator has no authority to adjudicate constitutional rights, had the arbitration order compelled Respondents' demotions, such an action would have exceeded the arbitrator's authority and would have been unlawful. *McDonald, supra.* Considering this Court's 1984 decision in *McDonald* and the long established exception to the rule of binding arbitration, Petitioner's alleged belief that the rule of binding arbitration compelled his violation of Respondents' constitutionally protected rights to due process was both incorrect and unreasonable.

Additionally, Petitioner's repeated assertions that his own experiences in the *Neal* litigation compelled his compliance with the arbitrator's allegedly implied mandate Respondents be demoted are disingenuous. Petitioner states that "his experience with the judicial responses to arbitration also informed his actions." (Pet. at p. 6). Petitioner then goes on to explain how his attempt to challenge an arbitrated decision involving Officer Neal was rejected by the Oklahoma Court of Civil Appeals. Petitioner again emphasizes the purported significance of these events to his own decision-making process when he writes: "He received from both the trial court and the intermediate appellate court boiler plate reminders of the sanctity of arbitration. The Oklahoma Supreme Court

refused to grant certiorari. This disabused him of any notion that he had a choice in this matter." (Pet. at p. 28).

The decisions of the Oklahoma appellate courts in *Neal* could not possibly have influenced Petitioner's own subjective belief in the propriety of his actions, nor could they have formed an objectively reasonable basis for anyone to conclude the demotions were lawful. The reason is simple: the Oklahoma appellate court's decisions in the *Neal* litigation occurred after Respondent and the City had already demoted Respondents.

Respondents were demoted effective April 26, 2000. (Appendix A at p. 5a). The unpublished opinion of the Oklahoma Court of Civil Appeals in the *Neal* case and upon which substantial emphasis is placed throughout Respondent's arguments to this Court, was not handed down until June 16, 2000, roughly two months after Petitioner demoted Respondents. (Appendix A at pp. 35a and 41a). The Oklahoma Supreme Court denied certiorari on October 17, 2000 another four months later. (Appendix A at p. 35a).[3] Only the trial court's decision in the *Neal* litigation occurred prior to Petitioner's demotions of the Respondents. Therefore, Justice Winchester in dissent below (Appendix A at p. 41a), and Petitioner's arguments to this Court that he actually and objectively reasonably relied on the June 16, 2000 unpublished opinion by the Oklahoma Court of Civil Appeals in the *Neal* litigation, are simply incorrect.

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[3] This information is also a matter of public record. Oklahoma Supreme Court dockets are available to the public at www.oscn.net. The appellate court docket number for *Neal* is case number AP-SD-93932.

In essence, Petitioner argues that an unpublished Oklahoma intermediate appellate court decision in another case, not handed down until months after the decision to demote Respondents, trumped his and the City's obligations to afford Respondents due process. In so doing, he argues that settled law required him to enforce the arbitration award. But, he ignores the undisputed facts that the arbitration award did not even mention Respondents, did not void or invalidate their promotions and did not order their demotions. He also suggests the dictates of the Oklahoma Supreme Court regarding binding arbitration supercede the long-standing case law establishing Respondents have constitutionally protected rights in their ranks. Finally, he also ignores long-standing precedent of this Court that even had the arbitrator adjudicated Respondents' constitutional rights, in so doing the arbitrator would have exceeded his authority under the arbitration agreement and federal law. *McDonald, supra.*

Petitioner insists his alleged subjective belief in the lawfulness of his actions was objectively reasonable. However, to accept Petitioner's argument that he reasonably believed the arbitration award lawfully required Respondents be demoted, one must:

1. completely disregard 1984 Supreme Court precedent;

2. completely disregard 1998 Tenth Circuit precedent;

3. adopt, at best, a contrived interpretation of the arbitration award itself;

4. adopt only a portion of Oklahoma Supreme Court precedent regarding the binding nature of arbitration while ignoring the same

precedent's pronouncement of exceptions to that rule when the arbitrator exceeds the scope of his or her authority; and

5. conclude that even though Respondents were not parties to the arbitration and did not commit misconduct justifying a "for cause" demotion, their demotions were nonetheless lawful.

Such a construction of the facts and controlling law is not objectively reasonable. The Oklahoma Supreme Court was correct in its determination that the law was "clearly established" sufficient to place Petitioner on notice that his actions were unlawful. There is no reason for this Court to grant certiorari.

IV. Should This Court Grant Certiorari, It Should Do So Only To Correct the Oklahoma Supreme Court's Determination that an Issue Of Fact Precludes the Finding that Petitioner Is Not Entitled To Qualified Immunity.

Pursuant to SUP. CT. R. 15, Respondents alternatively submit that should this Court choose to grant certiorari, it should do so only for the limited purpose of correcting the Oklahoma Supreme Court's determination that an issue of fact remains precluding the determination of whether Petitioner is entitled to qualified immunity. The Oklahoma Supreme Court resolved all facts and issues of law necessary to resolve the issue of qualified immunity – and those correct determinations compel the conclusion that Petitioner is not immune from suit.

The task for any court in determining a defendant's entitlement to qualified immunity is straightforward; it has been detailed in many opinions of this Court and in

the briefs submitted by the parties. The critical inquiry is whether the officer's conduct violated clearly established law at the time. Though this is a legal determination at its core, it necessarily involves some determination of the facts prior to resolution of the legal issue. *Harlow*, 472 U.S. at 528.

To be sure, there are some circumstances in which a factual dispute precludes summary judgment in favor a defendant seeking qualified immunity. *See e.g., Johnson,* 515 U.S. at 319-320. However, like *Johnson,* those cases usually occur when the issue of qualified immunity has been resolved adversely to the defendant and what actually remains is a disputed fact as to the liability of the defendant who is not immune from suit. In *Johnson,* three police officers sought immediate denial of their motion for summary judgment in an excessive force case. Their principal complaint was because the evidence was insufficient to establish they participated in the alleged beating of a prisoner, they were entitled to summary judgment and the denial was immediately appealable because they asserted qualified immunity defenses. *Id.* at 308. In deciding which types of summary judgment denials are subject to immediate appeal, this Court reemphasized the distinction between issues related to the defense of qualified immunity and those related to the ultimate determination of liability. *Id.* at 2157 ("... *Mitchell* rested upon the view that 'a claim of immunity is conceptually distinct from the merits of the plaintiff's claim.'") (citations omitted).

However, like *Johnson*, this case is not a case in which factual disputes remain with regard to the question of whether Petitioner is entitled to qualified immunity. The Oklahoma Supreme Court determined, correctly, that the demotions by Petitioner of Respondents violated their due

process rights because they had a protected interest in their ranks as Sergeants. (Appendix A at pp. 12a and 14a). Again, on this point the Oklahoma Supreme Court was unanimous and Petitioner does not challenge this determination. The Oklahoma Supreme Court also correctly determined that the law establishing Respondents' property interests and the law of due process was clearly established in April of 2000. Therefore, under the well-settled dictates of this Court, Petitioner is not entitled to qualified immunity. *Anderson, supra; Harlow,* 457 U.S. 800 ("Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by that conduct may have a cause of action.").

The Oklahoma Supreme Court did identify a factual dispute yet to be determined – whether there were other lawful actions Petitioner could have taken to comply with the arbitration award that would not have resulted in Respondents' demotions. (Appendix A at p. 18a). However, the Oklahoma Supreme Court's conclusion with regard to the legal significance of this factual dispute is incorrect. The factual dispute does not relate to qualified immunity; if it relates to anything at all, the dispute only goes to the question of Petitioner's liability for what has already been determined to be a violation of Respondents' due process rights.[4]

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[4] As will be presented on remand, there are alternatives the City and Petitioner could have chosen that would have been in compliance with the CBA, the arbitrator's award, Oklahoma law and would not have resulted in a violation of Respondents' rights to due process.

The mistake is apparent in the Oklahoma Supreme Court's summary of its own conclusion regarding Petitioner's liability. It wrote:

> [Respondents] sustained their burden of naming the clearly established right, a property interest in their employment ***and*** rank, through clearly established law at the time, i.e., the Tenth Circuit Court of Appeals' cases, *Hennigh* and *Dill.* (Appendix A at pp. 17a-18a) (emphasis in original).

At this point, the facts and legal issues relative to Petitioner's claimed immunity should have been resolved. The demotions were violations of Respondents' clearly established rights to due process. Therefore, Petitioner is not entitled to qualified immunity. However, the Oklahoma Supreme Court, acknowledging a disputed defense asserted by Petitioner, went on to write:

> [Petitioner] responds with the claim that he had no choice except to follow the Arbitrator's ruling. This position raises material factual issues: did [Petitioner] have to demote [Respondents] in order to comply with the arbitration award, thereby depriving them of their property interest and due process rights, or was there an alternative method of compliance which also complied with the law and the CBA? (Appendix A at p. 18a).

Respondents submit that this factual dispute is irrelevant to all the issues in this case, including the question of Petitioner's liability. However, if at all relevant this factual dispute goes to Petitioner's ultimate liability, not his immunity from suit. Nonetheless, in the very next sentence, the Oklahoma Supreme Court writes:

> Did [Petitioner] disregard clearly established law at the time? (Appendix A at p. 18a).

Thus, it is apparent that the Oklahoma Supreme Court believes the two questions it has presented are but two sides of the same coin – they are not. The first question is yet unresolved by the record evidence. The second question, however, was resolved by the Oklahoma Supreme Court itself: Petitioner demoted Respondents; the demotions deprived Respondents of their property interests in their employment and rank and due process, and the law establishing such was clearly established as of April 2000.

Finally, as alluded to above, the record is clear that Respondents also moved for summary judgment on their due process claims in the trial court below. Believing the denial of summary judgment to a party seeking affirmative relief and damages is not an immediately appealable order, Respondents only appealed the granting of summary judgment to the City and Petitioner to the Oklahoma Supreme Court. At issue in this Court is Petitioner's entitlement to qualified immunity. By advancing the argument that the unresolved factual dispute identified by the Oklahoma Supreme Court – the existence of other lawful alternatives to demoting Respondents – is not relevant to the determination of qualified immunity, Respondents are not conceding that the factual dispute is actually relevant to the ultimate question of liability. In fact, Respondents believe that the existence of alternatives is not relevant to the determination of whether they are entitled to recover damages for the violations of their rights to due process from either Petitioner or the City of Edmond.

Instead, Respondents submit that should this Court grant certiorari, it should do so for the limited purpose of correcting the Oklahoma Supreme Court's determination

that the unresolved question of fact is relevant to the determination of Petitioner's qualified immunity. It is not. To the contrary, under the facts decided by the Oklahoma Supreme Court it's clear that Petitioner is not entitled to qualified immunity.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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